91-1461

Supreme Court, U.S.
FILED
FEB 20 1992
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NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1991

RICK MARTIN,
PETITIONER,

V,

STATE OF ALABAMA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

FOR REVIEW

1. Whether Petitioner's rights to due process of law under the Fourteenth Amendment of the United States Constitution have been abridged by a holding of a Alabama State Court that there exists sufficient evidence to convict the Petitioner of Capital Murder when all of the testimony and evidence against the Petitioner in the case comes from either an alleged unindicted accomplice or a co-defendant in trial, when there exists a state law which provides that a conviction of felony cannot be had on the testimony of an accomplice unless corroborated by other evidence. The issue of whether the unindicted witness was an accomplice having been submitted to the jury, when there has been an instruction by the trial judge for the jury to apply incriminating heresay testimony, alleged to have been said by the Co-defendant about

acts by the Petitioner, to the co-defendant but not to the Petitioner; following a refusal for a request for a severance of the trial of the Petitioner and Co-defendant.

2. Whether Petitioner's rights to due process of law under the Fourteenth Amendment of the United States Constitution have been abridged by a holding of a Alabama State Court that the jury had sufficient evidence to find intent on behalf of the Petitioner to commit Capital Murder when there has been an instruction by the trial judge for the jury to apply incriminating heresay testimony, alleged to have been said by the Co-defendant about acts by the Petitioner, to the co-defendant but not to the Petitioner; following a refusal for a request for a severance of the trial of the Petitioner and Co-defendant; when that instruction to the jury would leave the Petitioner's presence as the only evidence of his intent to aid and abet in the crime of Capital Murder.

PARTIES

The Caption contains the names of all the parties in the court below.

TABLE OF CONTENTS

Questions Presented	1
The Parties	3
Table Of Contents	4
Table of Authorities	5
Opinions Below	6
Statement of Jurisdiction	7
Constitutional Provisions Involved	9
Statement of the Case	10
Reasons for Granting the Writ	16
Conclusion	19

TABLE OF AUTHORITIES

Barton v. United States
203 F. 2d 894 17

Code of Alabama
Section 12-21-222 18

Herring v. State
540 So. 2d 795 17

Lewis v. State
456 So. 2d 413 19

McElroy Alabama Evidence
Section 300.01 (7) 18

United States Constitution
Amendment Fourteen 9

OPINIONS BELOW

1. The opinion of the Alabama Court of Criminal Appeals affirming the Petitioners conviction has not yet been reported. A copy of this opinion is reproduced as Appendix A to this petition.

STATEMENT OF JURISDICTION

Petitioner seeks review of a final decision of the Alabama Supreme Court denying Petitioner's application for certiorari rendered on November 22, 1991. This was preceded by an application for rehearing to the Alabama Court of Criminal Appeals filed on May 10, 1991 and overruled on June 14, 1991. Said Application for rehearing followed the opinion rendered on April 26, 1991 by the Alabama Court of Criminal Appeals affirming the conviction of the Petitioner for Capital Murder. The Petitioner has filed this petition within the required 90 days of the final action by the Alabama Supreme Court which is the highest court in the State of Alabama. This Court has jurisdiction under 28 U.S.C. Section 1257.

Where Petitioner has exerted timely a claim that he has been denied his right to a fair trial in a State Court by due process of law as guaranteed to him under the Fourteenth amendment, and where the

highest Court of the State has failed to exercise its right to review the opinion of a lower court, when there exists both Federal and State cases which prohibit the acts of the trial court; then the Supreme Court has the right to grant Certiorari to review the actions of the State Courts to assure that no citizen will be deprived of his liberty without due process of law as guaranteed by the United State Constitution in Amendment Fourteen.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment Fourteen:

Section 1 Citizens of the United States.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Defendants, William Chris Hagood and Ricky Martin, were indicted for capital murder committed during the course of a robbery. They were found guilty of capital murder as charged in the indictment and were sentenced to life in prison without the possibility of parole. The state's evidence tended to show that on August 28, 1988, the body of James Lindsey was found on a county road between Decatur and Hartselle, Alabama. The victim had been stabbed three times-- once in the back and twice in The chest. Death was caused by a combination of loss of blood and breathing blood into the lungs. The evidence showed that several weeks earlier, the victim had obtained marijuana from Anthony Simmons. Simmons had known Lindsey for several years but had never previously sold him marijuana. Simmons testified at trial that Lindsey did not pay him for the marijuana he had sold him several weeks

prior to his death. He further stated that he had obtained this marijuana from Hagood. Simmons made several attempts to get the money from Lindsey but was unsuccessful. On the day he was killed, Lindsey had called Simmons to ask if Simmons could get him some more marijuana. Simmons stated that he might be able to, and he asked him if he had the money that he owed him for the marijuana he had sold him previously. Lindsey stated that he would try to get the money.

At approximately 5:00 p.m. on August 28, 1988, Simmons went to Hagood and talked with him about obtaining more marijuana for Lindsey. Ricky Martin, Hagood's brother-in-law, was with Hagood when this discussion took place. Hagood then asked Simmons about paying for the marijuana he had given him previously. Simmons offered to borrow the money, but the Defendants said they would get the money out of Lindsey if they had to "whip his ass." They agreed that same evening to talk about

the "deal." After Simmons left the Defendants, he called Lindsey and told him that he could probably get the marijuana he wanted and that Lindsey should call him back at about 7:00 P.M. that evening.The Defendants arrived at Simmons's house at around 7:00 p.m. that same day. Several people were at Simmons's house when the Defendants arrived, so they went outside to talk about the deal. They told Simmons that they had the marijuana. Simmons called Lindsey and told him to meet them behind the Jet Mart convenience store on Highway 31 between Decatur and Hartselle. The three left Simmons's home, Simmons driving his own car and the Defendants following in another vehicle. They arrived at the meeting place and parked their cars. The Defendants parked on a gravel road behind theJet Mart convenience store.Simmons then left in his car to get Lindsey In the meantime, Lindsey had gone to visit a friend, Elbert Clements, to see if he could get the money for the marijuana. Michael Short and Renea Dalton were present when Lindsey arrived at Clement's home. Clememts agreed to lend Lindsey $500.00 if Lindsey would pay him $100.00 in interest and if he was paid by the next day. Lindsey agreed to these terms.

Having obtained the money, Lindsey and Clements, who wished to protect his investment, drove to the designated area and waited in front of the Jet Mart. Simmons arrived and took Lindsey to where he had left the appellants. The Defendants asked Simmons whether the victim had the money he owed. Simmons replied that he did. The Defendants told Simmons that the marijuana was in the trunk of the car. They opened the trunk, and Hagood began fumbling for something in the trunk. He told them that could not find the marijuana. Martin then got inside the car and said that he could not find it in the car either. Simmons walked back to his car to get a cigarette. He heard Lindsey say, "Oh, shit." When he went over to the car that the appellants were driving, he saw the victim lying face up on the ground, making gurgling noises.

TheDefendants then asked Simmons where the money was. Simmons got the money from the victim and gave it to Martin. Martin handed the money to Hagood. The Defendants asked Simmons to help them drag the body away from the car, but he refused. Hagood gave Simmons $150.00 and told him to keep his mouth shut. Simmons, fearing for his

life, took the money and went home. He told his wife what had happened.

Meanwhile, Clements was waiting for Lindsey to return to his car. When Lindsey didn't return, Clements called Michael Short, who had been with them earlier in the evening. When Short arrived, he looked for Lindsey, but could not find him. Short then left and started to drive home down a gravel road when he saw a body. It was Lindsey. Short went back to the Jet Mart parking lot where Clements had stayed and they both called the police.

Hagood testified at trial that he went with Simmons and Martin to the area behind the Jet Mart. He said that Martin worked on his car after Simmons left to get Lindsey. This was at approximately 8:30 p.m.. When Simmons returned with Lindsey, Simmons and Lindsey approached Martin's car. He testified that Martin and Lindsey started arguing and that Lindsey attacked Hagood with a piece of pipe. Hagood stated that he pulled out a pocket-knife and accidentally, in self-defense, stabbed Lindsey in the back and then twice in the chest. There were several inconsistencies in his testimony.

Hagood was arrested the day after the incident. In his possession were two $100 bills and three $20 bills. Martin was not located for two months. Martin was finally found, through an anonymous tip, in a trailer in Virginia Beach, Virginia. After the police entered the trailer by using a battering ram, appellant Martin said, "Who the hell told you I was here?" 1

1. Restated from opinion of Court of Appeals

REASONS FOR GRANTING THE WRIT

The Fourteenth amendment of the United States Constitution guarantees every United States Citizen a fair trial in a criminal prosecution in a State Court; however in this case Petitioner has been convicted of Capital Murder without the benfit of sufficient evidence due to an error on behalf of the trial judge in refusing to grant a severance on motion of Petitioner's attorney when it became apparent that a witness had surprised Petitioner's attorney with damaging testimony which would have been heresay as to Petitioner. The jury instead instructed the jury as follows: Record page 700-701

"THE COURT Let me give you these instructions before I let it slip my mind. Let me instruct you on some testimony that you just heard from Mr. Wiggins, and I'm not going to attempt to quote his testimony to you, I am going to just verbalize it because ya'll heard the testimony, you remember what it was and go by what you remember. Testimony concerning Mr. Martin's stabbing of the victim, whatever that testimony was. You may not use that testimony when you are considering the case of the state versus Martin. That would be classified as hearsay testimony as to Mr. Martin. You may not--that's excluded from your consideration when you consider the case of Mr.. Martin during your deliberations because it is hearsay. Mr. Martin was not present when it was stated, which makes it hearsay and it cannot be used against him. Do all of you understand what evidence and testimony I am talking about? Anybody that does not, if you will raise your hand. Is there any of you that cannot consider this case against Mr. Martin without considering that test-

-imony we are talking about?"

In Barton v United States,263 F. 2d 894 under almost identical facts ruled that:

"Considering the substance and terms of Barton's statements, we doubt whether it was at all possible to carry out that instruction. To do so certainly would require twelve minds more perfectly disciplined than those of the average human jurors.

Unless that admonition was effective, then Mitchell has been deprived of his constitutional right to be confronted with the witnesses against him, for he has been afforded no opportunity to cross-examine Barton as to the truthfulness of his many accusatory statements."

[ONE]

Following this error by the court the reliance on the rulings of the jury to determine the sufficiency of the evidence became an impossible challenge.

The jury was asked thereafter to determine whether Simmon was an accomplice. When you consider Herring v. State, 540 So. 2d 795, which states that riding to the scene of a killing even without further acts made one an accomplice; it is hard to imagine how Simmons would not be considered to be an accomplice. Therefore when the jury ruled that

Simmons was not an accomplice, it seems likely that they were being influenced by the previously tainted testimony.

If so under Section 12-21-222, Code of Alabama (1975) which states:

> a conviction of a felony cannot be had on the testiony of an accomplice unless corroborated by other evidence tending to connect the appellant with the commission of the offense, and such corroborative evidence, if it merely shows the commission of the offense or the circumstances thereof, is not sufficient.

With this statute in mind there is no testimony at all to be considered against the Petitioner so where could the jury have found sufficiency unless they considered the tainted testimony.

According to McElroy ALABAMA EVIDENCE, section 300.01 (7). The common test for determining whether there is sufficient corroboration of the testimony of accomplice is by eliminating evidence of the accomplice and then examining the remain-

ing evidence tending to connect appellant with the commission of the offense. SEE APPENDIX C FOR MOTION OF ACQUITTAL

[TWO]

The Sufficiency of Petitioner's intent to commit Capital Murder was found by the jury also, but consider Lewis v. State, 456, So. 2d 413, wherein the court stated the principal that if the Defendant was an accomplice to the felon only, but , not to the killing; then he could not be convicted of capital murder. Considering the facts that were supposed to be considered by the Jury, it is obvious that the tainted testimony is being considered for without it, the jury could not have reached a verdict of Capital Murder. SEE APPENDIX B FOR ACQUITTAL MOTION

CONCLUSION

The ends of justice require that certiorari be granted to this petitioner; for to do less would but to make a mockery of justice.

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TABLE OF APPENDICES

APPENDIX A, OPINION OF
COURT OF CRIMINAL APPEALS 3

APPENDIX B, MOTION FOR
JUDGMENT OF ACQUITTAL 41

APPENDIX C, MOTION FOR
JUDGMENT OF ACQUITTAL 44

APPENDIX D, ORDER OF ALABAMA COURT OF
CRIMINAL APPEALS DENYING APPLICATION FOR
REHEARING 47

APPENDIX E, ORDER OF ALABAMA SUPREME
COURT DENYING PETITION FOR WRIT
OF CERTIORARI 50

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1990-91

CR-89-121

William Chris Hagood and Ricky Martin

v.

State

Appeal from Morgan Circuit Court

(CC 89-105 and 89-106)

TAYLOR, JUDGE

The appellants, William Chris Hagood and Martin, were indicted for capital murder committed during the course of a robbery. They were found guilty of capital murder as charged in the indictment and were sentenced to life in prison without the possibility of parole. The state's evidence tended to show that on August 28, 1988, the body of James Lindsey was found on a county road between Decatur and Hartselle, Ala. The victim had been stabbed

three times-- once in the back and twice in the chest. Death was caused by a combination of loss of blood and breathing blood into the lungs. The evidence showed that several weeks earlier, the victim had obtained marijuana from Anthony Simmons. Simmons had known Lindsey for several years but had never previously sold him marijuana. Simmons testified at trial that Lindsey did not pay him for the marijuana he had sold him several weeks prior to his death. He further stated that he had obtained this marijuana from Hagood. Simmons made several attempts to get the money from Lindsey but was unsuccessful. On the day he was killed, Lindsey had called Simmons to ask if Simmons could get him some more marijuana. Simmons stated that he might be able to, and he asked him if he had the money that he owed him for the marijuana he had sold him previously. Lindsey stated that he would try to get the money.

At approximately 5:00 p.m. on August 28,

1988, Simmons went to Hagood and talked with him about obtaining more marijuana for Lindsey. Ricky Martin, Hagood's brother-in-law, was with Hagood when this discussion took place. Hagood then asked Simmons about paying for the marijuana he had given him previously. Simmons offered to borrow the money, but the appellants said they would get the money out of Lindsey if they had to "whip his ass." They agreed to meet back at Simmons's house at 7:00 p.m. that same evening to talk about the "deal." After Simmons left the appellants, he called Lindsey and told him that he could probably get the marijuana he wanted and that Lindsey should call him back at about 7:00 p.m. that evening.

The appellants arrived at Simmons's house at around 7:00 p.m. that same day. Several people were at Simmons's house when the appellants arrived, so they went outside to talk about the deal. They told Simmons that they had the marijuana. Simmons called Lindsey

and told him to meet them behind the Jet Mart convenience store on Highway 31 between Decatur and Hartselle. The three left Simmons's home, Simmons driving his own car and the appellant following in another vehicle. They arrived at the meeting place and parked their cars. The appellants parked on a gravel road behind the Jet Mart convenience store. Simmons then left his car to get Lindsey.

In the meantime, Lindsey had gone to visit a friend, Elbert Clements, to see if he could get the money for the marijuana. Michael Short and Renea Dalton were present when Lindsey arrived at Clement's home. Clements agreed to lend Lindsey $500.00 if Lindsey would pay him $100.00 in interest and if he was paid by the next day. Lindsey agreed to these terms. Having obtained the money, Lindsey and Clements, who wished to protect his investment, drove to the designated area and waited in front of the Jet Mart. Simmons arrived and took Lindsey to where he had left the appel-

lants. The appellants asked Simmons whether the victim had the money he owed. Simmons replied that he did. The appellants told Simmons that the marijuana was in the trunk of the car. They opened the trunk, and Hagood began fumbling for something in the trunk. He told them that could not find the marijuana. Martin then got inside the car and said that he could not find it in the car either. Simmons walked back to his car to get a cigarette. He heard Lindsey say, "Oh, shit." When he went over to the car that the appellants were driving, he saw the victim lying face up on the ground, making gurgling noises.

The appellants then asked Simmons where the money was. Simmons got the money from the victim and gave it to Martin. Martin handed the money to Hagood. The appellants asked Simmons to help them drag the body away from the car, but he refused. Hagood gave Simmons $150.00 and told him to keep his mouth shut. Simmons, fearing for his life, took the

money and went home. He told his wife what had happened.

Meanwhile, Clements was waiting for Lindsey to return to his car. When Lindsey didn't return, Clements called Michael Short, who had been with them earlier in the evening. When Short arrived, he looked for Lindsey, but could not find him. Short then left and started to drive home down a gravel road when he saw a body. It was Lindsey. Short went back to the Jet Mart parking lot where Clements had stayed and they both called the police.

Hagood testified at trial that he went with Simmons and Martin to the area behind the Jet Mart. He said that Martin worked on his car after Simmons left to get Lindsey. This was at approximately 8:30 p.m.. When Simmons returned with Lindsey, Simmons and Lindsey approached Martin's car. He testified that Martin and Lindsey started arguing and that Lindsey attacked Hagood with a piece of pipe. Hagood stated that he pulled out a pocket-knife

and accidentally, in self-defense, stabbed Lindsey in the back and then twice in the chest. There were several inconsistencies in his testimony.

Hagood was arrested the day after the incident. In his possession were two $100 bills and three $20 bills. Martin was not located for two months. Martin was finally found, through an anonymous tip, in a trailer in Virginia Beach, Virginia. After the police entered the trailer by using a battering ram, appellant Martin said, "Who the hell told you I was here?"

The appellants raise the following issues on appeal.

I

Hagood initially argues that the trial court erred in not allowing him to individually voir dire the prospective jurors. As this court had held on many occasions, an appellant has no constitutional right to individually voir dire prospective jurors in a capital case. Whether

to allow individual voir dire is a matter left to the sound discretion of the trial court. See Whisenhant v. State, 555 So.2d 219 (Ala. Cr. App. 1988), aff'd 555 So.2d 235 (Ala. 1989); Hallford v. State, 548 So.2d 526 (Ala. Cr. App. 1988), aff'd, 548 So.2d 547 (Ala. 1989), cert. denied, ___ U.S. ___, 110 S. Ct. 354, 107 L. Ed. 2d 342 (1989); Bell v. State, 475 So.2d 601 (Ala. Cr. App. 1984), aff'd, 475 So.2d 609 (Ala. 1985), cert. denied, 474 U.S. 1038, 106 S. Ct. 607, 88 L.Ed.2d 585 (1985).

In the instant case, the trial court did not allow an individual voir dire, but he split the prospective jurors into groups of 12 so that counsel could question them. As we recently stated in Perry v. State, [Ms. 8 Div. 301, March 16, 1990] ____ So.2d___ (Ala. Cr. App. 1990):

"Because it is within the trial court's discretion as to whether the jury should be qualified in groups, 'Morrison v. State, 500 So.2d 36, 52 (Ala. Cr. App. 1985), affirmed, 500 So.2d 57

(Ala. Cr. App. 1986), cert. denied, 481 U.S. 1007 (1987), the trial court's decision to conduct voir dire in groups of fourteen was within its discretion."

___So2d at ___.

II

Hagood next contends that the procedure for striking jurors set out in Rule 15.4(h), A.R. Crim. P. Temp.; violates the principle of equal protection. Specifically, he contends that his equal protection rights were violated because the appellants were tried together and each received only 9 strikes and the prosecution received 19. As Judge Tyson, speaking for this court in Sumpter v. State, 480 So.2d 608 (Ala. Cr. App. 1985), stated:

"'Rule 15.4(h) provides that when defendants are tried jointly, in selecting the jury, the "district attorney shall strike first, and shall strike

one (1) name from the list, then one (1) defendant shall strike one (1) name from the list; then the district attorney shall strike one (1) more name from the list." The rule makes it clear that the parties shall strike in a definite order; first the State, then one defendant, then the State, then the second defendant..... A law changing the number of jury strikes in a criminal case is procedural and does not affect matters of substance. Haynes v. State, 424 So.2d 669,670-72 (Ala.Cr.App.1982), cited as proper authority in Ex parte Cofer, 440 So.2d 1121 (Ala.1983). See also Opinion of the Justices No. 229, 342 So.2d 361, 362 (Ala. 1977), holding that the "method of selecting juries in criminal case, ... is within the rulemaking power of the Supreme Court of Alabama as granted by the Constitutional provision quoted (Amendment 328, Section 6.11)."""

480 So.2d at 612, quoting from Holsemback v. State, 443 So.2d 1371, 1377 (Ala. Cr. App. 1983), cert. de-

nied, 443 So.2d 1371 (Ala. 1984). See also Means v. State, 545 So.2d 100 (Ala. Cr. App. 1987), writ quashed, Ex parte Dorsey, 545 So.2d 106 (Ala. 1989). This statute is not unconstitutional. See Ward v. State, 484 So.2d 536, 539 (Ala. Cr. App. 1985).

III

Hagood next contends that this case should be reversed because there are 28 instances of "off the record discussions" that are not included in the transcript on appeal. Initially, we note that it is the appellants's duty to make a complete record on appeal. If the appellant wished the transcript to be corrected or supplemented he could have filed a motion pursuant to Rule 10 (f), A.R. App. P.. We note that a Rule 10 (f) motion was filed by both appellants; however, no mention was made of any "off the record discussions."

Furthermore, it is clear after a review of the proceedings that appellant's counsel was aware that every statement was not being taken down by the court reporter. Thus, if he wanted these

discussions in the record, he could have make a motion at the time that each discussion took place so that they would be included. We note that Hagood's counsel did make a motion that all proceedings be taken down by the court reporter at the beginning of the trial. At this time the trial court instructed the court reporter that the opening and closing statements be transcribed. Moreover, the appellant had made no mention of what was deleted from the record.

IV

Appellant Hagood next contends that the trial court erred in overruling his motion for mistrial after Officer Paul Cain stated during his testimony that he was familiar with appellant Hagood because he had had him under surveillance before the offense in question. Defense counsel objected and moved for a mistrial. The trial court did not grant the mistrial motion, but he did give the following curative instruction:

"Let me--I need to make these documents and instructions to the jury. Let me instruct you that any testimony that you have heard concerning any other investigation of Mr. Hagood or any reference to Mr. Hagood or his place being under surveillance or any reference that may have been related to another crime is not admissible. That is not evidence for you to consider. I am excluding any of that testimony and all of that testimony from you. You are to erase that from your mind and not consider it and decide this case without any reference to those-- to that testimony. And I will ask you now whether or not any of you would be unable to decide this case without considering that testimony that I have just referred to. Would any of you be unable to set that aside and put it out of your mind -- would you be unable to decide this case without considering that ? And if you would be unable to do that, I would like you to raise your hand at this time.

"(No response.)"

Initially we observe that, "the granting of mistrial is an extreme measure and should be exercised only when manifestly necessary or when the ends of justice would otherwise be defeated." Free v. State, 495 So.2d 1147, 1157 (Ala. Cr. App. 1986).

Moreover, as this court has stated, "'There is a prima facie presumption against error where the trial court immediately charges the jury to disregard the improper remarks or answers.'" St. John v. State, 523 So.2d 521, 5214 (Ala. Cr. App. 1987), quoting Wadsworth v. State, 439So.2d 790 (Ala. Cr. App. 1983), cert. denied, 466 U.S. 930, 104 S.Ct. 1716, 80 L.Ed.2d 188 (1984); Kelley v. State, 405 So.2d 636 (Ala. 1980). "The prejudicial effect of the comment was, therefore, cured and appellant's motion for a mistrial was correctly denied." Grace v. State, 431 So.2d 1331, 1335 (Ala. Cr. App.

1982). See also Scott v. State, 473 So.2d 1167 (Ala. Cr. App. 1985).

V

Hagood further contends that the trial court erred in receiving into evidence several knives which were found at appellant Hagood's home. He stated that there is no testimony that one of the knives was the murder weapon. The knives were the subject of a motion in limine. However, at the time that the knives were received into evidence, no objection was made. As our Supreme Court stated in Phillips v. State, 527 So.2d 157 (Ala. Cr. App. 1988):

"It is the law 'that an appellant who suffers an adverse ruling on a motion to exclude evidence (or other matters, e.g., argument of counsel), made in limine, preserves this adverse ruling for post-judgement and appellant review only if he objects to the introduction of the proffered evidence or other matters and assigns specific grounds therefore at the time of trial, unless he has obtained express acquiescence of the trial

> judge that such subsequent objection to evidence proffered at trial and assignment of grounds therefor are not necessary. Se. C. Gamble, The Motion in Limine: A Pretrial Procedure That Has Come of Age, 33 Ala. L. Rev. 1 (1981)."

527 So.2d at 156. See also Parks v. State, [Ms. 1900462, April 11, 1991], ___So.2d ___ (Ala. 1991); Lee v. State, 562 So.2d 657 (Ala. Cr. App. 1989).

> Moreover, in the present case, when the trial court ruled on appellant's motion to exclude the knives, the trial court specifically stated, "I am going to overrule. I'll allow them unless I hear something between now and the time they are offered," indicating that this was not the last occasion that the trial court expected to hear arguments on this issue. Appellant's counsel failed to preserve this issue because no objection was made when the knives were actually received into evidence.

VI Hagood next contends that the trial court abused its discretion in denying his motion for mistrial on the basis of illegal communications between an officer who testified at trial and one of the jurors. Hagood alleges that one of the state's witnesses talked to several jurors prior to the appellant's testimony. The evidence on point is conflicting. The evidence showed that at the hearing on the motion, Lisa Brenner, a paralegal who worked for Martin's trial counsel, stated that she thought she saw one of the officers who testified at trial talking to a group of jurors outside the restroom on the third day of trial. She stated that he appeared to be close to a group of jurors. Martin stated during this hearing that the officer had told him that he had talked with the jurors. The officer was questioned concerning this statement and stated that he had talked with no jurors except the alternate juror and that was after the alternate had been discharged from the case. He stated that the district attorney and one of

Martin's attorney's were present when this conversation with the dismissed alternate juror took place. The bailiff in charge of the jury testified that he saw no one approach the jurors during the course of the trial and that he did not see the officer at any time talking with any of the jurors. One of the jurors who the officer had allegedly talked with was a juror who was excused due to a migraine headache. As this court stated in Cox v. State, 394 So.2d 103 (Ala. Cr. App. 1981):

"Whether there has been a communication with a juror and whether it has caused prejudice are questions of fact to be determined by the trial court in the exercise of sound discretion. Gaffney v. State, Ala. Cr. App., 342 So.2d 403, cert. denied, Ala., 342 So.2d 404 (1976). This ruling will not be disturbed in the absence of a showing of abuse of discretion." 394 So.2d at 106. We must examine the facts of the particular case. See Weeks v. State, 456 So.2d 395 (Ala.

Cr. App. 1983), aff'd, 456 So.2d 404 (Ala. 1984), cert. denied, 471 U.S. 1030, 105 S.Ct. 2051, 85 L. Ed. 2d 324 (1985). In the instant case, the facts support the ruling of the trial court. There is no evidence that there was an abuse of discretion here.

VII

Hagood next argues that the trial court erred in refusing to give four of his requested jury instructions. The following occurred after the court's oral charge:

"Mr. Madison [Hagood's Counsel] - Judge, we would take exception first to the Court's oral charge as to self-defense. I think the Court properly laid out the elements of self defense but did not tell the jury that in the event you find self-defense your verdict must be not guilty.

"Mr. Madison - Judge, we would except to the Court's failing to give defendant Hagood's requested written jury instruction number two, three, four, six, nine -- I'm sorry, nine was give. I withdraw that as to nine. Eleven, twelve, thirteen, fourteen, fifteen, sixteen, and seventeen, and eighteen on the grounds they were not adequately covered in the Court's oral instructions."

The trial court then reinstructed the jury on self-defense. We agree with the state that Hagood did not preserve the trial court's failure to instruct the jury on requested instructions three, four, six, and twelve. As the Alabama Rules of Criminal Procedure (Temporary) state:

"No party may assign as error the court's giving or failing to give a written instruction, or the giving of an erroneous, misleading, incomplete, or otherwise improper oral charge, unless he objects thereto before the jury retires to con-

sider its verdict, stating the matter to which he objects and the grounds of his objection."

Rule 14 A. R. Crim. P. Temp. (Emphasis added.)

It is the appellant's burden to "...advise the trial judge of his objections to the jury charge, stating his grounds, before the jury retires." Cox v. State, 500 So.2d 1296, 1299 (Ala. Cr. App. 1986). "The objection must be specific enough to point out the alleged error so as to allow the judge to correct the error." Biddie v. State, 516 So.2d 486 (Ala. Cr. App. 1987). The objection "we except" is not sufficient to put the trial court on notice of the claimed error. See Johnson v. State, 552 So.2d 883 (Ala. Cr. App.1989). "The reference to 'all of' his written charges as ' correct statements of the law' is simply not a specific ground of objection....." Connolly v. State, 539 So.2d 436, 438 (Ala. Cr. App. 1988).

VIII

Hagood further argues that the trial court

erred in not granting his motion for mistrial when the prosecutor referred in his opening remarks to the expected testimony of a witness which was different than the statements furnished to defense counsel prior to trial. Specifically, he contends that the state violated Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), in not disclosing this information to the defense prior to trial. The statement made by the witness to the prosecutor was that he had bought drugs on consignment from Hagood and owed him money. Hagood contends that this information was exculpatory since it conflicted with prior statements made by the witness.

The record reflects that the prosecutor had talked with the witness after court recessed on the first day of trial, and at that time the witness told him about his drug activity with Hagood. The prosecutor stated that he had told defense counsel about the witness's statement the morning after he had received the

statement. No error occurred here. See Curry v. State, 502 So.2d 836 (Ala. Cr. App. 1986). Furthermore, the prosecution had supplied the defense with all statements made by the witness prior to this revelation and all the names of the witnesses that were being called at trial. As the prosecution stated, defense counsel had complete access to all the witnesses.

Hagood also contends that the state failed to disclose that two of the prosecution's witnesses had changed their stories about the time frame involved in the offense. The district attorney stated that he had just learned about this information the night before and that he had revealed the information to defense counsel that morning.

Our Supreme Court stated in Ex parte Dickerson, 517 So.2d 628 (Ala. 1987):

"' In order to establish a Brady violation, the defendant must establish the following ele-

ments: 1. that the prosecution suppressed the evidence; 2. that the evidence was of a character favorable to the defense; and 3. that the evidence was material. Kennedy v. State, 472 So.2d 1106 (Ala. 1985).'"

King v. State, 574 So.2d 921, 928 (Ala. Cr. App. 1990), quoting Dickerson, 517 So.2d at 630.

It is clear that in the instant case, assuming that the information was exculpatory, Hagood has failed to meet the Brady requirement. "The appellants have failed to show how they were harmed by the delayed disclosure of the information." Shearer v. State, [Ms. 89-670, January 18, 1991] ___ So.2d ___ (Ala. Cr. App. 1991). We also note that defense counsel made no request for a continuance.

IX

Hagood lastly argues that the trial court erred in allowing Pernell Wiggins to testify at trial for several reasons. Hagood argues that since Wiggins was placed in a cell to elicit a state-

ment from Hagood, any statement he made to Wiggins should not be admitted since he was not informed of his Fifth and Sixth Amendment rights prior to making the statement. We note that the only objection made at trial was that Hagood did not voluntarily waive his Fifth Amendment right against self-incrimination. Pernell Wiggins, a jail-mate of Hagood's, stated that Hagood made several statements to other inmates which he overheard while they were both in a holding cell waiting to see a doctor on August 31, 1988. Wiggins said that after the appellant stated talking he joined the discussion and discovered why Hagood had been arrested. Wiggins testified that Hagood had said at that time, "The motherfucker thought he was a bad ass, and "The deal went bad." Hagood further stated that when they were swapping the money for the drugs, Hagood attacked Lindsey with a knife and Lindsey picked up a pipe and swung at him and knocked the knife from his hand. Hagood grabbed Lindsey and

held him while Martin struck Lindsey with a knife. The appellants then put something in the trunk and left the scene. Hagood also stated at that time that the knife he used was from the collection of knives taken from his residence.

Wiggins also testified that he was offered no reward to elicit any statement from Hagood. He had sent a letter to Officer Goodwin, who was investigating the case, after he was in the holding cell with Hagood and Hagood had made the above statements. He testified that after the letter was sent Goodwin asked him to wear a wire and go back into a cell with Hagood. Goodwin stated that he had no contact with Wiggins prior to his receiving the letter. It was after he received the letter that he asked Wiggins to wear a wire. The tape of this later conversation between Wiggins and Hagood was inaudible. Wiggins stated on five or six occasions during his testimony that the statements he testified that Hagood made were made while

they were both in a holding cell waiting to see a doctor, which was prior to the writing of the letter to Officer Goodwin. The letter was received into evidence at trial.

The record supports the decision of the trial court that no agency relationship existed when Wiggins was first placed in the cell with Hagood. The trial court's findings in this regard are presumed correct. See Kuhlmann v. Wilson, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986). After a review of the record, it appears that only the conversation which occurred prior to Wiggins writing the letter to Goodwin was brought out during Wiggin's testimony. As the district attorney stated prior to Wiggin's testimony, "If it will help you, I don't plan to offer anything after he was wired."

"' According to Terry v. State, 397 So.2d 217 (Ala. Cr. App. 1981), Miranda warnings are not required in instances where inculpatory or otherwise admissible statements are made to persons who are not law enforcement officers or

their agents.'" Connolly v. State, 500 So.2d 57, 61 (Ala. Cr. App. 1985), aff'd, 500 So.2d 68 (Ala. 1986). Furthermore, see Illinois v. Perkins, ___ U.S. ___, 110 S.Ct. 2394, ___ L.Ed. 2d ___ (1990). (Undercover law enforcement officer posing as inmate need not give the Miranda warnings to an incarcerated suspect before asking questions that may elicit an incriminating response regarding an not yet charged crime). The trial court correctly allowed Wiggins to testify concerning his first conversation with Hagood. It appears from the record that the substance of the first conversation was the only testimony elicited from Wiggins. Thus, we believe no error occurred here.

Even if Wiggins had testified regarding the second conversation, that testimony would not be rendered inadmissible by the fact that he did not waive his right to counsel. As this court stated in McCall v. State, 501 So.2d 496 (Ala. Cr. App. 1986), whether the inmate, to whom the statement was made, was an agent would

not affect the admissibility of the statement under the Sixth Amendment since his right to counsel had not yet attached because the appellant had not been indicted. See McCall, 501 So.2d at 500.

Hagood also contends that the trial court erred in allowing the prosecution to ask Wiggins leading questions. Whether to allow such questions is left to the sound discretion of the trial court. See 12-21-138, Code of Alabama 1975. Furthermore, it appears that it was Martin's counsel and not Hagood's counsel who objected to the use of leading questions by the prosecutor.

Hagood further argues, concerning Wiggins's testimony, that the trial court erred in allowing the witness's memory to be refreshed when the witness did not state that his memory needed refreshing. In the instant case, the witness's memory was refreshed by looking at the letter he wrote to Officer Goodwin. The trial court committed no error in allowing this. "A wit-

ness may refer to a writing for the purpose of refreshing his recollection without first, as a condition precedent, having shown that it is necessary for his recollection to be refreshed." C. Gamble, McElroy's Alabama Evidence 116.02(6) (3d ed. 1977). The appellant argues several other issues concerning the refreshing of the witness's testimony. However, the only objection made at trial was that the witness's testimony could not be refreshed unless the witness first stated that his memory needed refreshing. All grounds of objections not stated at trial are waived and therefore are not preserved for purposes of appeal. See Owes v. State, 512 So.2d 797 (Ala. Cr. App. 197). Hagood also contends that the trial court erred in not allowing Wiggins to identify the officers he had worked with in the past on other cases. Wiggins had testified that he had on two prior occasions helped the North Alabama Drug Unit make a couple of drug buys. The only question that the court did not allow defense counsel to

ask was what were the names of the officers. The witness had already testified that he did not know Officer Goodwin prior to the instant occasion. We do not see how this prejudiced Hagood in any way. No error occurred which "injuriously affected substantial rights " of Hagood. See Rule 45. A.R. App.P.

X

Martin initially argues that there was insufficient evidence to find him guilty of capital murder because the only evidence was the testimony of his accomplices, Simmons and Hagood, and one can not be convicted on the uncorroborated testimony of an accomplice. For the following reasons, we do not agree.

As 12-21-222, Code of Alabama 1975, provides: "A conviction of felony cannot be had on the testimony of an accomplice unless corroborated by other evidence....." As Judge Bowen recently stated:

"' Except where the state's evidence undisput-

edly makes the witness an accomplice, the defendant has the burden of showing the witness's complicity.' Jacks v State, 364 So.2d 397, 403 (Ala. Cr. App.), cert. denied, 364 So.2d 406 (Ala. 1978). 'Whether a witness is an accomplice may be a question of law or fact, depending on the circumstances. Where there is a doubt or dispute concerning the complicity of a witness and the testimony is susceptible to different inferences on that point, the question is for the jury.' Ex parte Bell, 475 So.2d 609, 611-12 (Ala.), cert. denied, 474 U.S. 1038, 106 S.Ct. 607, 88 L.Ed.2d 585 (1985). 'For the corroboration requirement of [Ala. Code 1975, 12-22-222] to apply, however, "it must clearly appear that the witness in question is an accomplice."' Ex parte Bates, 461 So.2d 5, 6 (Ala. 1984)."

Connolly v. State, [Ms. 1 Div. 90, November 30, 1990] ___ So.2d ___, ___ (Ala. Cr. App. 1990).

As our Supreme Court stated in Ex parte Bell,

475 So.2d 609 (Ala. 1985), cert. denied 474 U.S. 1038, 106 S.Ct. 607, 88 L.ed. 2d 585 (1985): "Where there is a doubt or dispute concerning the complicity of a witness and the testimony is susceptible to different inferences on that point, the question is for the jury." Bell, 475 So.2d at 611-12. "A participant" in a crime is not synonymous with an accomplice." Bell, 475 So.2d at 613.

In the instant case, there is no question that Hagood and Martin were accomplices. However, the trial court submitted the issue as to whether Simmons was an accomplice to the jury for its determination. The testimony clearly established that the trial court was correct in submitting this issue to the jury. Simmons refused to help them drag the body and did not participate in the murder of the victim. Simmons testimony at the preliminary hearing was also admitted. Simmons stated at this hearing that he thought that he was taking Lindsey to buy some marijuana. He did not know that the

marijuana sale was a ruse. We believe that all this information made the question of whether Simmons was an accomplice a question of fact for the jury's determination.

"The evidence must be undisputed that the witness was an accomplice in order to mandate the corroboration of an accomplice's testimony under 12-22-222, Code of Alabama (1975). (citation omitted). '" The burden of proving a witness is an accomplice for the purposes of invoking the rule of 12-21-222 is on the defendant." (citation omitted).'"

Miller v. State, 518 So.2d 801, 807 (Ala. Cr. App. 1987). No error occurred here.

XI

Martin next contends that the trial court erred in failing to give his requested charges one, four, and five. Martin's trial counsel stated the following at the end of the trial court's charge to the jury:

"We take exceptions to the Court's refusal to grant defendant's requested charges -- defendant Martin's requested charges 1 through 16, inclusive. And on the grounds that they are correct propositions and statements of the law, and they were not adequately covered in the Court's oral charges."

No other mention was made of the failure of the trial court to give requested jury instructions one, four, and five. The objection made was not specific enough to put the trial court on notice of its alleged error in failing to give the instructions. See Connally , supra; Rule 14,A.R. Crim.P. Temp. Martin also argues that under the plain error doctrine we should reverse on this issue. As Rule 45 (A), A.R.App.P., states: "In all cases in which the death penalty has been imposed, the Court of Criminal Appeals shall notice any plain error defect..." Since this is not a case in which the appellants were sentenced to death, we are not compelled

to search the record for plain error.

Martin lastly argues that there was no evidence that he had the prerequisite intent to kill necessary to find him guilty of capital murder since he was not the triggerman. To be convicted of capital murder, an individual must have a particularized intent to kill. See Bankhead v. State, [Ms. 6 Div. 370, September 29, 1989] ___ So.2d ___ (Ala. Cr. App. 1989), aff'd, [Ms. 89-1179, February 15, 1991] ___ So.2d ___ (Ala. 1991). To be found guilty, Martin in this case must have had some intent to aid in the murder of Lindsey.

"' Aid and abet 'comprehend all assistance rendered by acts or works of encouragement or support or presence, actual or constructive, to render assistance should it become necessary.'" Jones v. State, 174 Ala. 53, 57, 57 So. 31 (1911), quoted in Radke v. State, 292 Ala. 290, 292, 293 So.2d 314 (1974). If the jury is convinced beyond a reasonable doubt that the defendant

was present with a view to render aid should it become necessary, the fact that the defendant is an aider and abettor is established. Jones, supra; Raiford v. State, 59 Ala. 106, 108 (1877). "The culpable participation of the accomplice need not be proved by positive testimony, and indeed rarely is so proved. Fuller v. State, 43 Ala. App. 632, 198 So.2d 625. Rather, the jury must examine the conduct of the parties and the testimony as to the surrounding circumstances to determine its existence."" (Citations omitted)

Watkins v. State, 495 So.2d 92, 102 (Ala. Cr. App. 1986), quoting from Gwin v. State, 456 So.2d 845, 851 (Ala. Cr. App. 1984).

We believe that the evidence presented a question which was correctly submitted to the jury for its determination. The trial court thoroughly instructed the jury on the issue of intent. Secondly, there evidence from which the jury could conclude that appellant Martin had the prerequisite intent. See Bankhead, citing Ken-

nedy v. State, 472 So.2d 1092 (Ala. Cr. App.), aff'd, 472 So.2d 1106 (Ala. 1984), cert. denied, 474 U.S. 975, 106 S.Ct. 340, 88 L.Ed.2d 325 (1985). No error occurred here. We see no reason to disturb the decision of the jury.

For the foregoing reasons this case is due to be and is hereby affirmed.

AFFIRMED.

ALL THE JUDGES CONCUR.

Appendix B

IN THE CIRCUIT COURT OF MORGAN COUNTY, ALABAMA

STATE OF ALABAMA

VS.

RICK MARTIN,

DEFENDANT

MOTION FOR JUDGMENT OF ACQUITTAL

Comes now the Defendant, Rick Martin, and moves this Court to enter a judgment of acquittal in this cause and would show unto the Court the following:

1. That the Defendant is charged with the offense of capital murder- murder during the course of a robbery in the first degree.
2. That the only witness called by the State

in reference to the acts of the murder is Anthony Simmons.

3. That Simmons testified that the money was taken from the victim after the fatal wounds were inflicted and he offered no testimony as to any prearrangement to rob the victim.

4. That Simmons testified he was the one who lured the victim to the scene, that he chose the location and time of the meeting, that he was the one who told the victim to bring money with him to the meeting and that the Defendant had no conversation or other communication with the victim.

5. By the State's own admissions this could be a drug sale gone bad.

WHEREFORE, the Defendant moves this Court to grant a motion for verdict of acquittal because

the State has failed to prove beyond a reasonable doubt that this was a murder committed during the course of a first degree robbery.

Wesley M. Lavender
Attorney for Defendant Martin
P.O. Box 43
Decatur, Al 35602

James G. Adams. Jr.
Attorney for Defendant Martin
P.O. Box 1607
Decatur, Al 35602

Note: Original Motion was signed by respective attorneys

Appendix C IN THE CIRCUIT COURT OF
MORGAN COUNTY, ALABAMA

STATE OF ALABAMA

VS.

RICK MARTIN,

DEFENDANT

MOTION FOR JUDGMENT
OF AQUITTAL

Comes now the Defendant, Rick Martin, and moves this Court to enter a judgment of acquittal in this cause and would show unto the Court the following:

1. That the Defendant is charged with the offense of Capital murder- murder during the course of a robbery in the first degree.
2. That the only witness called by the State in reference to the acts of the murder is Anthony Simmons.

3. That Simmons testified that the money was taken from the victim after the fatal wounds were inflicted and he offered no testimony as to any prearrangement to rob the victim.

4. That Simmons testified he was the one who lured the victim to the scene, that he chose the location and time of the meeting, that hee was the one who told the victim to bring money with him to the meeting and that the Defendant had no conversation or other communication with the victim.

5. That the witness Simmons is an accomplice as a matter of law and fact and the State has offered no corroboration of his testimony.

6. That with the exception of Simmons testimony there is no evidence to connect the

Defendant Martin with this crime.

WHEREFORE, the Defendant moves this Court to grant a motion for verdict of acquittal because the State has failed to offer any evidence to corroborate the testimony of Simmons that would connect the Defendant Martin with this crime.

Wesley M. Lavender

Attorney for Defendant Martin

P.O. BOX 43

Decatur, Al 35602

James G. Adams. Jr.

Attorney for Defendant Martin

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Decatur, Al 35602

Note: Actual Motion was signed by respective Attorneys

APPENDIX D

Court of Criminal Appeals
State of Alabama

Judicial Building, 445 Dexter Avenue

Montgomery 36130

JOHN PATTERSON
Presiding Judge
JOHN C. TYSON, III
WILLIAM M. BOWEN, JR.
SAM TAYLOR
H. WARD McMILLAN
Judges

Clerk's Office
(205) 242-4590

Court of Criminal Appeals No. 89-121
(Morgan Circuit Court No. 89-105;106)

William Chris Hagood and
Rick Martin
Appellant

vs. State of Alabama
Appellee

Dear Sir or Madam:

You are hereby notified that on June 14, 1991, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama; Application for rehearing overruled. Rule 39(k) motion denied. No opinion.

LANE W. MANN
CLERK

COURT OF CRIMINAL APPEALS

Hon. Larry Madison
P O box 487
Hartselle, Alabama 35640

Hon. Becky Meyer
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APPENDIX E

THE STATE OF ALABAMA---JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA

November 22, 1991

1901553

Ex parte Rick Martin

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: William Chris Hagood and Rick Martin V. State)

(CCA 89-121 (Morgan CC-89-105, 89-106))

CERTIFICATE OF JUDGEMENT

Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

Kennedy, J. Hornsby, CJ., Maddox, Shores and Houston, JJ., Concur.

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Supreme Court, U.S.
FILED
APR 8 1992
OFFICE OF THE CLERK

(3)

No. 91-1461

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

RICK MARTIN,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

ON A PETITON FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING THE PETITION

JAMES H. EVANS
Attorney General of Alabama

MARGARET SCHOLTEN CHILDERS
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QUESTIONS PRESENTED

1. Does this Honorable Court have jurisdiction to review the judgment of an intermediate appellate court where the petition did not request that a writ be issued to that court; does this Court have jurisdiction to review a federal constitutional claim by a state convict which is raised for the first time in this Court; does this Court have jurisdiction to review a decision which was not presented to the highest state court in a manner which would have permitted that court to review that decision; and does this Court have jurisdiction to review the state court's decision on an issue of state law?

2. Does this case merit review where the federal question raised by the Petitioner was not presented to the state courts, where the decision of the intermediate appellate court does not indicate that the decision was based upon

federal law but rather indicates that it was based upon state law, where the decision is of no importance except to the parties to this cause, and where no conflict has been demonstrated with other decisions of relevant courts?

TABLE OF CONTENTS

	PAGE
Questions Presented.....	i
Table of Contents.....	iii
Table of Authorities.....	iv
Opinions Below.....	1
Jurisdiction.....	1
Constitutional Provisions Involved.....	1
Statutes Involved.....	2
Statement of the Case.....	3
Summary of the Argument.....	11
Argument:	
I. THIS COURT DOES NOT HAVE JURISDICTION IN THIS CASE.....	13
II. THIS CASE DOES NOT MERIT REVIEW BY THIS COURT.....	22
Conclusion.....	26
Appendix.....	A-1

TABLE OF AUTHORITIES

CASES:	PAGE(S)
Aycock v. State, 291 Ala. 49, 277 So.2d 412 (1973).....	16
Banks v. State of California, 395 U.S. 708 (1969).....	15
Beck v. Washington, 369 U.S. 541 (1962).....	20,22
Board of Directors of Rotary International v. Rotary Club, 481 U.S. 537 (1987).....	21
Ex parte Andrews, 406 So.2d 1045 (Ala. 1981)...	16
Ex parte Phelps, 339 So.2d 124 (Ala. 1976)...	16,17
Ex parte Save Our Streams, Inc., 541 So.2d 549 (Ala. 1989).....	16
Ex parte Winchester, 544 So.2d 967 (Ala. 1989)....	16
Exxon Corporation v. Eagerton, 462 U.S. 176 (1983).....	21
Gotthilf v. Sills, 375 U.S. 79 (1963).....	18
Hagood v. State, 588 So.2d 526 (Ala.Crim.App. 1991).....	1,8 9,24

TABLE OF AUTHORITIES (CONT'D)

	PAGE(S)
Harris v. Reed, 489 U.S. 255 (1989).....	10
Interstate Circuit v. Dallas, 390 U.S. 676 (1968).....	13
Johnson v. State, 500 So.2d 494 (Ala.Crim.App. 1986).....	20
Matthews v. Huwe, 269 U.S. 262 (1925).....	13
McMaster v. Gould, 276 U.S. 285 (1928).....	18
Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954)..	13
Randall v. Board of Commissioners, 261 U.S. 252 (1923).....	14
Southern Electric Company v. Beha, 269 U.S. 186 (1925).....	18
Second National Bank of Cincinnati v. First National Bank of Okeana, 242 U.S. 600 (1917).....	14
Wainwright v. Goode, 464 U.S. 78 (1983).....	22
Webb v. Webb, 451 U.S. 493 (1981).....	18,20
Wisconsin Electric Co. v. Dumore Co., 282 U.S. 813 (1931).....	25

TABLE OF AUTHORITIES (CONT'D)

PAGE(S)

CONSTITUTIONAL PROVISIONS:

U.S. CONST. amend. XIV, §1..... 2

STATUTES:

28 U.S.C. §1257.....1,2,12,14, 17, 18

ALA. CODE §12-21-222 (1986).....2, 21

RULES OF COURT:

Alabama Rules of Appellate Procedure,

Rule 39(c).....15,16,17

Rule 39(d).....16

Rule 39(k).....10,16,17

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals is reported sub nom. Hagood v. State at 588 So.2d 526 (Ala.Crim. App. 1991). Both that court's order denying rehearing and the decision by the Alabama Supreme Court denying the Petitioner's petition for writ of certiorari also are reported at 588 So.2d 526.

JURISDICTION

The Petitioner alleges that this Court has jurisdiction under 28 U.S.C. §1257. The Respondent disputes this allegation, for the reasons discussed herein. The order of the Alabama Supreme Court denying discretionary review was entered on November 22, 1991.

CONSTITUTIONAL PROVISIONS INVOLVED

The petition addresses questions that allegedly involve the Due Process Clause of

the Fourteenth Amendment to the United States Constitution. Section 1 of the Fourteenth Amendment is set forth verbatim in the Petition For Writ of Certiorari.

STATUTES INVOLVED

28 U.S.C. §1257-State courts; certiorari

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes or, or any commission held or authority exercised under, the United States.

ALA. CODE §12-21-222 (1986) - Accomplice's testimony for felony conviction

> A conviction of felony cannot be had on the testimony of an accomplice unless corroborated by

other evidence tending to connect the defendant with the commission of the offense, and such corroborative evidence, if it merely shows the commission of the offense or the circumstances thereof, is not sufficient. (Code 1852, §641; Code 1867, §4193; Code 1876, §4895; Code 1886, §4476; Code 1896, §5300; Code 1907, §7897; Code 1923, §5635; Code 1940, T. 15, §307.)

STATEMENT OF THE CASE

For the purposes of this brief, the Respondent accepts the Petitioner's Statement of the Case, which was taken from the opinion of the Alabama Court of Criminal Appeals, as substantially accurate, with the following exceptions, corrections and additions:

When Anthony Simmons first talked with defendants Hagood and Martin on August 28, 1988, about getting some more marijuana for Jimmy Lindsey, Hagood initially said that he and Martin could probably get some. Hagood and Martin later said that they

would get the money already owed by Simmons from Lindsey, and that they might have to "whip [Lindsey's] ass" if he could not come up with the money. They both also told Simmons to tell Lindsey that they had some marijuana. They said that they would meet Simmons at Simmons' house at 7:00 p.m., and that they would talk more about the proposed marijuana deal then. (R. 481-487, 521, 532)

The $500 that Lindsey subsequently borrowed from Elbert Clements was in three $100 bills and ten $20 bills. (R. 437) Lindsey always carried a wallet, and he always had two silver coins in that wallet. One of the coins was a silver dollar, and the other was a smaller round coin. (R. 848-851) When Hagood was arrested the morning after Lindsey was killed, he had two $100 bills and three $20 bills in his wallet, and he also had two silver dollars in his pocket. (R. 578-579,

788-789, 816-817) Hagood was not employed at the time. (R.829) Lindsey's wallet was never found. (R.831, 849)

When Simmons and Lindsey got to where Simmons had left Hagood and Martin on the night Lindsey was killed, Simmons found that the defendants' car had been backed down a little road that connected with the gravel road near where he had left the defendants. It was dark outside. (R. 503-504)

Simmons was bent over inside his car lighting a cigarette when he heard Lindsey yell, "Oh, shit." (R. 511, 512) Simmons immediately went back to the defendants' car, where he found Lindsey lying face up on the ground, making gurgling noises. Martin was towards Lindsey's face on one side of Lindsey, and Hagood was towards Lindsey's feet on Lindsey's other side. (R. 511, 512)

Both Hagood and Martin then asked

Simmons where the money was. Simmons told them it was in Lindsey's pants. Hagood then told Simmons to help Martin drag Lindsey off, but Simmons refused. Martin then told Simmons to help him drag Lindsey, but Simmons again refused. Simmons then went over to his car. Martin took the money from Lindsey's pants, and Martin and Hagood dragged Lindsey off. (R. 511, 524) (There is no evidence whatsoever in the record to support the statement in the Court of Criminal Appeals' opinion that Simmons got the money from the victim and gave it to Martin. The only testimony on this point indicated that Martin personally took the money from Lindsey.)

Shortly after Lindsey was stabbed, a car that did not have its lights on was observed speeding down Highway 24. It was traveling away from the area where Lindsey had been stabbed and towards Hagood's home. After about twenty minutes, the

vehicle was stopped by a Moulton, Alabama, police officer. The passenger in the car was Hagood. Although the police officer was not able to positively identify Martin as the driver, he testified that the driver had a driver's license that identified him as Rick Martin, and that he believed that defendant Martin was the Rick Martin who was driving the car that he stopped that night. (R. 587-595, 596-601, 603) Hagood and Martin told the police officer that their lights were not on because the alternator was going out. (R. 600)

When Martin was found two months after the stabbing, he was in the trailer of a woman whose last name was Hagood who indicated that she was related to Martin by marriage. (R. 900-904, 906, 907-909)

Martin only raised three issues on appeal. His first argument was that Simmons was an accomplice under Alabama law, and that his conviction therefore was

improper under Alabama law because there was insufficient evidence corroborating Simmons' testimony. The Alabama Court of Criminal Appeals disagreed, finding that Alabama law did not require corroboration of Simmons' testimony because whether Simmons was an accomplice was a question for the jury to determine under Alabama law, and there was sufficient evidence from which the jury could decide that Simmons was not an accomplice to the crime. Hagood v. State, 588 So.2d at 536 (Appendix to the Petition, at 33-36)

Martin's second argument on appeal was that the trial court had erred in failing to give three jury instructions he had requested which allegedly addressed the differences between felony murder and capital murder under Alabama law. The Court of Criminal Appeals found that this issue had not been preserved for appellate review. Hagood v. State, 588 So.2d at

536-537, and 533 (Appendix to the Petition, at 36-38).

Martin's final argument on appeal was that there was insufficient evidence of intent to kill on Martin's part to support his conviction under Alabama law. In making this argument, Martin relied upon matters such as a lack of evidence of intent to kill prior to going to the scene of the crime, the alleged unlikeliness that he and Hagood undertook to intentionally kill Lindsey when someone else was present, and the lack of testimony to contradict Hagood's account that Lindsey struck the first blow. The Court of Criminal Appeals decided that the evidence raised a question for the jury and that there was evidence from which the jury could conclude that Martin had the prerequisite intent. Hagood v. State, 588 So.2d at 537 (Appendix to the Petition, at 38-40).

Martin filed a timely application for

rehearing following the decision of the Court of Criminal Appeals in which he repeated the identical arguments he had originally submitted to that Court. Martin did not make a motion pursuant to Rule 39(k), Alabama Rules of Appellate Procedure, for the finding of any facts upon rehearing contrary to or in addition to the facts stated in the opinion of the Court of Criminal Appeals. (The only Rule 39(k) motion in this case was filed by the State, in connection with its application for rehearing attempting to secure clarification, in light of this Court's decision in Harris v. Reed, 489 U.S. 255 (1989), regarding some of the issues Hagood had raised on appeal. It is the State's Rule 39(k) motion that is referred to in Appendix D to the Petition; a single notification concerning all three applications for rehearing in this case was provided by the Court of Criminal Appeals.)

After denial of his application for rehearing, Martin submitted a petition for writ of certiorari to the Alabama Supreme Court. Martin asked the Alabama Supreme Court to review the decision of the Court of Criminal Appeals on two of the issues he had presented to that Court, to wit: 1) whether Simmons was an accomplice as a matter of law under Alabama law whose testimony had to be corroborated under Alabama law; and 2) whether there was sufficient evidence of intent to kill on Martin's part to support his conviction under Alabama law (this argument was verbatim the argument Martin had submitted to the Court of Criminal Appeals).

SUMMARY OF THE ARGUMENT

This Court does not have jurisdiction to review the decision of the Alabama Supreme Court because that decision is not a final judgment of the highest state court

within the meaning of 28 U.S.C. §1257. The Petitioner did not request that a writ of certiorari be issued to the Alabama Court of Criminal Appeals. This Court also does not have jurisdiction because the Alabama Supreme Court was not given a fair opportunity to review the decision of the Alabama Court of Criminal Appeals, the federal question upon which the Petitioner seeks review was never presented to the state appellate courts, and the issues decided by the Alabama Court of Criminal Appeals were issues involving state law only.

Even if this Court does have jurisdiction, it should deny the petition because the state court decision in question does not merit review by this Court. The federal question raised was not presented to or decided by the state court. The decision of the Alabama Court of Criminal Appeals appears to be based solely upon

state law. The case was not presented to the Alabama Supreme Court in a manner which permitted that court to review the decision of the Court of Criminal Appeals. The decision has no adverse precedential value. It is not in conflict with prior decisions of this Court or of other relevant courts, and it is of no importance except to the parties to this cause.

ARGUMENT

I. THIS COURT DOES NOT HAVE JURISDICTION IN THIS CASE.

The Petitioner has asked this Court to issue a writ of certiorari to the Alabama Supreme Court. This Court clearly has no jurisdiction to do this because the Alabama Supreme Court only entered an order in this case declining to grant discretionary review. Interstate Circuit v. Dallas, 390 U.S. 676, 678 n.1 (1968); Matthews v. Huwe, 269 U.S. 262, 263-265 (1925); Michigan-

Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 159-160 (1954); Second National Bank of Cincinnati v. First National Bank of Okeana, 242 U.S. 600 (1917); and Randall v. Board of Commissioners, 261 U.S. 252 (1923).

On the basis of the foregoing authority, the Respondent respectfully submits that the instant petition should be dismissed for lack of jurisdiction because the Petitioner has sought a writ of certiorari directed only toward a state court whose decision was not a final judgment of the highest state court in which a decision could be had within the meaning of 28 U.S.C. §1257. The Petitioner has not requested that a writ be directed to the Alabama Court of Criminal Appeals.

If the Respondent is mistaken, and this Court may issue a writ to the Alabama Court of Criminal Appeals despite the fact that the Petitioner did not request such a

writ, then the Respondent submits that this Court still lacks jurisdiction to do this.

The decision of an intermediate state appellate court is not a final judgment rendered by the highest state court in which a decision could be had, and this Court lacks jurisdiction to review that decision, where the Petitioner did not ask the highest state court to review the judgment of the intermediate appellate court. Banks v. State of California, 395 U.S. 708 (1969). Although Martin asked the Alabama Supreme Court to review the decision of the Court of Criminal Appeals, he did not provide the Alabama Supreme Court with any real opportunity to review the decision.

A writ of certiorari may be granted by the Alabama Supreme Court only upon the filing of a petition which alleges a ground for review in accordance with the requirements of Rule 39(c), Alabama Rules of

Appellate Procedure. Ex parte Andrews, 406 So.2d 1045 (Ala. 1981); Rule 39(c) and (d), A.R.A.P.; and Aycock v. State, 291 Ala. 49, 277 So.2d 412, 413 (1973). Furthermore, in determining whether certiorari should be granted, the Alabama Supreme Court is limited to the facts stated in the opinion of the Court of Criminal Appeals unless the petitioner made a request for the finding of additional or corrected facts in connection with his application for rehearing, pursuant to Rule 39(k), Alabama Rules of Appellate Procedure. Ex parte Phelps, 339 So.2d 124 (Ala. 1976); Rule 39(k), A.R.A.P.; Ex parte Save Our Streams, Inc., 541 So.2d 549, 550-552 (Ala. 1989); and Ex parte Winchester, 544 So.2d 967, 968 (Ala. 1989).

Martin did not file a proper petition for writ of certiorari in the Alabama Supreme Court. He relied upon Rule 39(c)(4), Alabama Rules of Appellate

Procedure, as his ground for review but he did not allege a conflict with prior appellate decisions as required by that Rule. Under Rule 39(c)(4), a petition must quote the conflicting parts of the decisions in question or state specifically and with particularity wherein the decision in question is conflicting with a prior decision or decisions. Ex parte Phelps, 339 So.2d at 124; and Rule 39(c)(4), A.R.A.P. Although Martin stated that a conflict existed, no conflict was apparent in the petition.

Martin also did not make a Rule 39(k) request in conjunction with his application to the Court of Criminal Appeals for rehearing. Thus, under Alabama appellate practice, the Alabama Supreme Court could not consider any facts different from or in addition to those stated in the opinion of the Court of Criminal Appeals.

Under 28 U.S.C. §1257, this Court does

not have jurisdiction except to review judgments rendered by the highest state court in which a decision could be had. Since Martin did not make a proper request for review of the decision of the Court of Criminal Appeals, the Alabama Supreme Court could only deny the petition that was filed. Since Martin did not properly seek review of the decision of the Court of Criminal Appeals, this Court does not have jurisdiction to review that opinion. See Southern Electric Company v. Beha, 269 U.S. 186 (1925); Gotthilf v. Sills, 375 U.S. 79 (1963); and McMaster v. Gould, 276 U.S. 285 (1928).

Furthermore, in order for this Court to have jurisdiction over an issue under 28 U.S.C. §1257, the issue must have been adequately presented to the state courts for resolution. Webb v. Webb, 451 U.S. 493, 496-497 (1981). It is difficult to discern exactly what Martin is presenting

as his issue in this case, but he clearly is claiming a violation of his right to due process involving the sufficiency of the evidence in light of state law requiring corroboration of an accomplice's testimony, and also in light of the trial court's instruction to the jury not to apply certain testimony against Martin. In the body of the petition, it appears that Martin is arguing that the trial court erred in refusing to grant him a severance during the middle of the trial.[1] None of these arguments were presented to the state

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[1]Martin claims that this was erroneous because, unless the trial court's admonition to the jury to disregard certain testimony was effective, he was deprived of his right of confrontation as he had no opportunity for cross-examination. It would be inappropriate to address the merits of this contention at this point, but the Respondent is compelled to point out that Martin was not deprived of his right of confrontation since the declarant, Hagood, did testify and was subject to cross-examination.

appellate courts.

On appeal, Martin argued that Simmons was an accomplice as a matter of state law and that, therefore, his conviction required corroborating testimony. He also argued that there was insufficient evidence of intent to kill. Neither of these arguments were presented as federal constitutional matters. They were presented strictly as matters of state law. Also, no question concerning the trial court's refusal of a severance was presented for appellate review.

Alabama courts deem issues which are not both argued and supported by legal authority on appeal to be waived. Johnson v. State, 500 So.2d 494, 498 (Ala.Crim.App. 1986). See Webb, 451 U.S. at 498; and Beck v. Washington, 369 U.S. 541, 553 (1962). Where, as here, the state appellate court did not address a federal question, it is

presumed that the issue was not properly presented to it. Exxon Corporation v. Eagerton, 462 U.S. 176, 181 n. 3 (1983); and Board of Directors of Rotary International v. Rotary Club, 481 U.S. 537, 550 (1987). Since Martin did not present the federal issues raised in his petition to the state courts for resolution, this Court does not have jurisdiction to consider those issues.

Finally, this Court does not have jurisdiction over issues involving only the application of state law. It is apparent from the body of the petition that Martin disagrees with the Court of Criminal Appeals' decision that ALA. CODE §12-21-222 (1986) was not applicable in this case, and that he is asking this Court to find, contrary to the decision of the Court of Criminal Appeals, that this statute did apply. In other words, his insufficiency of the evidence argument is premised upon

arguing that the Court of Criminal Appeals erred as a matter of state law in deciding that there was sufficient evidence that witness Simmons was not an accomplice that corroboration of his testimony was not required as a matter of law. The Court of Criminal Appeals' interpretation of this state statute followed the Alabama Supreme Court's interpretation of this statute, and this interpretation is binding on this court. Wainwright v. Goode, 464 U.S. 78, 83-84 (1983). This court does not have jurisdiction over this state law issue. Beck v. Washington, 369 U.S. at 554-555.

II. THIS CASE DOES NOT MERIT REVIEW BY THIS COURT.

This Court's time usually and properly is devoted to federal questions requiring resolution either because of their unique nature and public importance, or because a serious conflict exists, either between the

decision in question and prior decisions of this Court or among the lower courts in general. None of these considerations mitigating in favor of review by this Court exist in this case.

As discussed above, the federal question(s) which Martin asks this Court to consider were never presented to or decided by the state appellate courts. Thus, this case does not involve a federal issue decided by the highest state court. This Court should not undertake to review such a case, and there is no valid reason to accept this case for review. Martin not only did not present the federal questions he now raises to the state appellate courts, he did not even present the state law issues actually decided by the intermediate state appellate court to the highest state court in a fashion effectively permitting review of those issues.

There is no error apparent on the face

of the opinion of the Court of Criminal Appeals in this case, and the decision by the Court of Criminal Appeals does not have any particular precedential value. The Court decided that Simmons was not an accomplice as a matter of law under Alabama law, that Martin had not preserved his issue concerning the denial of certain jury instructions, and that sufficient evidence was presented to create a jury question on the issue of whether Martin had the requisite intent to kill. Hagood v. State, 588 So.2d at 536-537 (Appendix to the Petition, at 33-40).

The actual sufficiency of the evidence of Martin's intent to kill is not an important issue requiring decision by this Court. Accepting a case such as this for review would start this Court on an unending process of examining the facts in each case in which a sufficiency of the evidence claim is raised in order to

determine whether this Court agrees as to the sufficiency of the evidence.

To warrant review based upon an allegation of a conflict, there must demonstrably be a direct and irreconcilable conflict with other applicable authority. No conflict with any applicable decision is demonstrated by the petition. See Wisconsin Electric Co. v. Dumore Co., 282 U.S. 813 (1931).

The Petitioner has not asked this Court to do anything but determine that an error was made under the facts in his case, and he has not demonstrated that a decision in this case would affect anyone but himself. This case does not warrant review by this Court.

CONCLUSION

On the basis of the foregoing, the Respondent submits that the petition is due to be denied.

Respectfully submitted,

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APPENDIX

ALABAMA RULES OF APPELLATE PROCEDURE

RULE 39. REVIEW OF DECISIONS OF COURTS OF APPEAL.

(a) Method. In the case of a pre-trial appeal by the state in a criminal case (see Rule 17, Temporary Alabama Rules of Criminal Procedure; Rule 15.7, Alabama Rules of Criminal Procedure, as of January 1, 1991), either party may petition for writ of certiorari without having first applied for a rehearing in the court of criminal appeals. In the case of a proceeding pursuant to Rule 21(e), Alabama Rules of Appellate Procedure, an application for rehearing in the court of appeals is not a prerequisite for review in the supreme court.

In all other cases, decisions of the courts of appeals may be reviewed by the supreme court upon petition for writ of certiorari only after a court of appeals has overruled an application for rehearing directed to the point, issue, or decision

complained of. (For the procedure to be followed for the filing of an application for rehearing where no facts are stated by the court of appeals, or where the applicant is not satisfied with the statement of facts in the opinion of the court of appeals, see subsection (k) of this rule.)

Payment of the amount prescribed in Rule 35A(3) shall be made to the clerk of the supreme court at the time the petition for writ of certiorari is filed.

(b) Time. The petition for writ of certiorari, with an accompanying brief, shall be filed with the clerk of the supreme court pursuant to Rule 25(a), within 14 days (two weeks) after the decision of the court of appeals on the application for rehearing, except that in the case of a pre-trial appeal by the state in a criminal case, a petition for writ of certiorari must be filed within seven days

(one week) of that court's order overruling an application for rehearing.

(c) Grounds. The petition for writ of certiorari to this court in a criminal case in which the death penalty was imposed as punishment shall be filed by counsel representing the petitioner on the appeal of the case, and will be granted as a matter of right. Unless counsel who represented the appellant on the original appeal has been replaced by new or additional counsel, he shall prepare the petition for the writ of certiorari and file the same in accordance with these rules. If new or different counsel has been appointed to represent the appellant, it shall be his duty to prepare the petition for writ of certiorari and file the same in accordance with these rules. In all other cases, civil or criminal, petitions for writs of certiorari will be considered only:

(1) From decisions initially holding valid or invalid a city ordinance, a state statute or a federal statute or treaty, or initially construing a controlling provision of the Alabama or federal Constitution;

(2) From decisions that affect a class of constitutional, state or county officers;

(3) From decisions where a material question requiring decision is one of first impression in Alabama;

(4) From decisions in conflict with prior decisions of the United States Supreme Court, the Alabama supreme court, or the Alabama courts of appeals; provided that when (4) is the basis of the petition, it must quote that part of the opinion of the appropriate court of appeals, and that part of the prior decision with

which the conflict is alleged; or it shall state specifically and with particularity wherein such decision is in conflict; and,

(5) Where petitioner seeks to have controlling supreme court cases overruled which were followed in the decision of the court of appeals.

(d) Form of petition. The petition shall be on letter-size paper and shall contain:

(1) The style of the case (the same as in the court of appeals), the name of the petitioner, the circuit court from which the cause is on appeal, and the name of the court of appeals to which the petition for certiorari is directed;

(2) The date of the decision sought to be reviewed and the date of the order overruling the application for rehearing; and

(3) The concise statement of the grounds, (c)(1)-(5), supra, on which the petition is based.

A copy of the opinion of the court of appeals shall be attached to the petition as an exhibit. ...

(k) Scope of review. The review shall be that generally employed by certiorari and will ordinarily be limited to the facts stated in the opinion of the particular court of appeals. If the petitioner is not satisfied with that statement of facts, he may, on application for rehearing in that court, present any additional or corrected statement of facts and request that court to add or correct those facts in its opinion on rehearing. If the court fails to accede to the request, petitioner may copy the statement in the petition to this court, with references therein to the pertinent portions of the clerk's record and

reporter's transcript, and it will be considered along with the statement of facts in the opinion of the appellate court, if found to be correct.

The application of the law to the stated facts is included in the scope of review.

In all cases in which the death penalty has been imposed, upon review of the opinion of the court of criminal appeals on certiorari, the supreme court may notice any plain error or defect in the proceeding under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial rights of the petitioner.

ALABAMA RULES OF APPELLATE PROCEDURE

RULE 40. APPLICATIONS FOR REHEARING.

The application for rehearing may be made separately or may be included at the beginning of the applicant's brief. (NOTE: Except as to pre-trial appeals by the state in criminal cases, in order for a party to secure certiorari review by the supreme court it is necessary that that party have filed an application for rehearing in the court of appeals. If the court of appeals has ruled without stating facts, or has given what the rehearing applicant considers an incorrect or inadequate statement of the facts, then the applicant must, on application, also make a request pursuant to Rule 39(k) in order to seek certiorari reivew later.) All applications for rehearing, and the briefs supporting the applications, must be filed with the clerk of the court within 14 days (two weeks) after the rendition of the judgment,

except that in the case of a pre-trial appeal by the state in a criminal case, any application for rehearing, with the supporting brief, must be filed with the clerk of the court within seven days (one week) after the rendition of the judgment. No party can, as a matter of right, apply for a rehearing unless a brief was filed with the clerk as provided by the rules. No brief opposing the application is required, but a brief from the opposing party may be filed within 14 days (two weeks) -- or, in the case of a pre-trial appeal by the state in a criminal case, within seven days (one week) -- after the filing of the original application and brief. No second application for rehearing will be considered unless the rehearing reversed or substantially modified the original opinion of the court.